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REVISITING TRADE SECRET EXTRATERRITORIALITY

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I. INTRODUCTION

Theft of United States companies' trade secrets continues to be a problem that both the federal government and private businesses have struggled to effectively address on various fronts.[1] One challenge to doing so is the principle of territoriality, which establishes that U.S. law generally applies only to acts that take place on U.S. soil.[2] The presumption against extraterritoriality is a canon of statutory interpretation.[3] It stems from the principle that federal statutes are meant to apply only within the territorial jurisdiction of the United States unless congressional intent indicates otherwise.[4] Therefore, American companies whose trade secrets are misappropriated abroad have limited options for relief.

U.S. law provides both civil and criminal remedies for trade secret misappropriation.[5] Criminal claims under the Economic Espionage Act (EEA) are an option for private companies, albeit a limited one, as federal prosecutors have sole discretion to file criminal charges.[6] Aggrieved trade secret owners must therefore file civil actions to obtain recourse against misappropriators.[7] However, no established framework exists for the extraterritorial application of U.S. trade secret law in the civil context.[8] This was, in part, due to the fact that for over one hundred years state law governed the civil law of trade secrecy.[9] Nevertheless, things changed after President Obama signed the Defend Trade Secrets Act of 2016 (DTSA) into law on May 11, 2016.[10] The DTSA is the first federal law in the United States to create a federal civil cause of action for trade secret misappropriation.[11] As the DTSA does not preempt or displace state law

[1] *See, e.g.*, Robin L. Kuntz, *How Not to Catch a Thief: Why the Economic Espionage Act Fails to Protect American Trade Secrets*, 28 BERKELEY TECH. L.J. 901, 903 (2013) ("[T]he legislative history behind the [Economic Espionage Act of 1996] reveals that Congress was especially worried about foreign threats to American economic prosperity.").

[2] *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010); Timothy R. Holbrook, *Territoriality and Tangibility After* Transocean, 61 EMORY L.J. 1087, 1100 (2012).

[3] *Morrison*, 561 U.S. at 255.

[4] *Id.*

[5] 18 U.S.C. §§ 1831–1839 (2012 & Supp. V 2018).

[6] Kuntz*, supra* note 1, at 907–09; *see also* Gerald O'Hara, *Cyber-Espionage: A Growing Threat to the American Economy*, 19 COMMLAW CONSPECTUS 241, 251 (2010) ("Despite its aspirations to impose harsh criminal penalties, the EEA fails to provide a robust enforcement mechanism against foreign cybercriminals who initiate attacks on American corporations.").

[7] The civil cases will therefore be the focus of this Article.

[8] Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 507 (1997) ("[T]he general rules governing the extraterritorial application of federal statutes are in a state of uncertainty.").

[9] Sharon K. Sandeen & Christopher B. Seaman, *Toward a Federal Jurisprudence of Trade Secret Law*, 32 BERKELEY TECH. L.J. 829, 833 (2017).

[10] Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified as amended at 18 U.S.C. §§ 1832–1839 (2012 & Supp. V 2018)); Remarks on Signing the Defend Trade Secrets Act of 2016, 2016 DAILY COMP. PRES. DOC. 1 (May 11, 2016).

[11] Sandeen & Seaman, *supra* note 9, at 833.

(except, in some respects), the United States now has two bodies of civil trade secret law developing simultaneously: the DTSA and the UTSA.[12] Thus, trade secret owners now have the option of bringing a trade secret claim in state or federal court, a choice that was only previously available if they could invoke the diversity jurisdiction of the federal courts or join their state trade secret claim with another federal cause of action.[13]

Significantly, the DTSA amended the criminal EEA and effectively turned it into a civil statute by providing a private right of action, stating: "[a]n owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce."[14] While that language was added to the statute, the preexisting language set out in section 1837 of the EEA regarding extraterritoriality remained untouched.

Section 1837 of the EEA reads as follows:

> This chapter also applies to conduct occurring outside the United States if—(1) the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States or a State or political subdivision thereof; or (2) an act in furtherance of the offense was committed in the United States.[15]

This language provides a hook by which foreign theft of trade secrets or espionage may be prosecuted criminally in the United States. It appears settled that this provision, as part of the criminal EEA, applies extraterritorially.[16] Crimes committed against the U.S. government are treated differently with regard to the presumption against extraterritoriality.[17]

However, the controversial question is whether the identical language and provision as incorporated into the DTSA applies to civil actions. This is the discrete mission we undertake in this Article. We tackle the confusion surrounding the DTSA's extraterritorial reach and suggest the use of a "domestic effect test," which could be implemented via either amending the statute to provide greater clarity on its extraterritorial intention, or, absent an amendment, as a means of guiding courts in interpreting the statute's extraterritorial reach in civil cases.

Part II discusses recent and relevant case law that provides guidance on framing the inquiry on extraterritoriality. Part III analyzes the DTSA's extraterritorial provision and the arguments on both sides of the question as to whether Congress expressed an affirmative indication that section 1837 would

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[12] 18 U.S.C. § 1838 (2012).

[13] Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 § 2(a) (codified as amended at 18 U.S.C. § 1836 (2012 & Supp. V 2018))**.**

[14] 18 U.S.C. § 1836(b) (2012 & Supp. V 2018).

[15] 18 U.S.C. § 1837 (2012 & Supp. V 2018).

[16] *Id.*

[17] *See* United States v. Buck, No. 13 Cr. 0282, 2017 U.S. Dist. LEXIS 158080, at *20 (S.D.N.Y. Aug. 28, 2017).

apply to the DTSA. Part IV proposes what we coin a "domestic effect test": the proposed language of which would (1) make explicit that section 1837 includes the civil right of action; and (2) add a third criteria for extending the Act to conduct occurring outside the U.S. if "the offense causes substantial economic harm in the United States."[18] Part IV further explains why this test would, either via amendment or through court interpretation, clarify and solidify the DTSA's extraterritorial reach. Such proposed analysis will prove to be consistent with what courts and Congress have done in other areas of law that have faced similar questions on a statute's extraterritorial reach. Finally, Part V concludes, asserting that this new language is a vital step toward providing a meaningful remedy for domestic victims of extraterritorial misappropriation, as well as providing consistency among the circuits as they wrestle with extraterritoriality in trade secrecy.

II. EXTRATERRITORIALITY IN THE COURTS

Generally, courts presume that federal statutes will not apply extraterritorially.[19] Thus, before a statute can be applied extraterritorially, this presumption must be overcome.[20] As discussed below, even though the language of section 1837 has been in effect since 1996, there does not appear to be any case law interpreting it.[21] In the next Part, we discuss the arguments surrounding the applicability of the DTSA. Before assessing the statute's extraterritorial reach, however, we must first set out the contours that may guide such an inquiry. In a previous paper on extraterritoriality,[22] Professor Rowe discussed extraterritoriality in intellectual property generally and more specifically extraterritorial protection for trade secrets at the International Trade Commission (ITC). Here, we provide a general summary of the courts' more recent deliberations on extraterritoriality in cases that would be most applicable to the DTSA. If a defendant were to raise an extraterritoriality challenge on a DTSA claim, these are likely to be the cases that would guide a federal court's inquiry on the DTSA, given the relevant parallels.

A. Case Law Summary

One case that presents similar facts to those that might appear in a trade secret extraterritoriality case is *United States v. Ivanov*.[23] In *Ivanov*,[24] a Connecticut district court addressed the question of whether the court may exercise

[18] *See infra* Part IV.A.

[19] Bradley, *supra* note 8, at 510–11.

[20] *Id*. at 510.

[21] Sandeen & Seaman, *supra* note 9, at 903.

[22] Elizabeth A. Rowe & Daniel M. Mahfood, *Trade Secrets, Trade, and Extraterritoriality*, 66 ALA. L. REV. 63, 82–83 (2014).

[23] 175 F. Supp. 2d 367 (D. Conn. 2001).

[24] *Id.* at 370.

extraterritorial jurisdiction over a Russian defendant who allegedly violated the Computer Fraud and Abuse Act (CFAA)[25] and the Hobbs Act.[26] The defendant was located in Russia and used computers located in Russia, but he ultimately accessed computers that were located in the United States.[27] Ultimately, the court found that the CFAA and the Hobbs Act applied extraterritorially.[28] The court reasoned that it had jurisdiction because the "intended and actual detrimental effects" of the defendant's actions occurred within the United States as well as because Congress expressed an extraterritorial intent for each statute that the defendant was charged with violating.[29] In supporting its "effects" analysis, the Connecticut court cited to *United States v. Steinberg*, holding that, "it has long been a commonplace of criminal liability that a person may be charged in the place where the evil results, though he is beyond the jurisdiction when he starts the train of events of which that evil is the fruit."[30]

Morrison v. Nat'l Austl. Bank Ltd.[31] is instructive as to whether reference to "foreign commerce" in section 1836 of the DTSA is sufficiently weighty in the evaluation of extraterritoriality. In *Morrison*, the Supreme Court addressed whether the phrase "foreign commerce" in the Securities Exchange Act's definition of "interstate commerce" was enough to rebut the presumption against extraterritorial application.[32] The Court determined that it did not.[33] The Court expressly stated: "When a statute gives no clear indication of an extraterritorial application, it has none."[34] In other words, the *Morrison* Court found that on its face, the section at issue (section 10(b)) contained nothing to suggest that it applied abroad.[35] The Court further went on to find that "the fleeting reference to the dissemination and quotation abroad of the prices of securities traded on domestic exchanges and markets cannot overcome the presumption against extraterritoriality."[36] Thus, there was no *affirmative indication* that section 10(b)

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[25] 18 U.S.C. § 1030 (2012).

[26] *Id.* § 1951.

[27] *Ivanov*, 175 F. Supp. 2d at 369.

[28] *Id.* at 370.

[29] *Id.*

[30] *Id.* (quoting United States v. Steinberg, 62 F.2d 77, 78 (2d Cir. 1932)).

[31] 561 U.S. 247 (2010).

[32] *Id.* at 262-63.

[33] *Id*.

[34] *Id*. at 255.

[35] *Id.* at 262. The relevant provisions read as follows:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange. . . . To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe.

15 U.S.C. § 78j(b).

[36] *See* Morrison, 561 U.S. at 263.

applies extraterritorially.[37] As a result, *Morrison* establishes a threshold inquiry of looking to the language of the statute in question to find Congress' affirmative indication that the statute should be applied extraterritorially.[38] If after this threshold inquiry, a court finds that a statute is not extraterritorial, a claim may still survive if it involves a domestic application of the statute."[39] In practice, the *Morrison* framework is not particularly easy to implement and it has been criticized as "vague and susceptible to incongruous results."[40]

More recently, the Supreme Court's guidance on extraterritoriality comes from *RJR Nabisco, Inc. v. European Community.*[41] This case arose from allegations that RJR Nabisco and several related entities — along with various organized crime groups — allegedly participated in a global money-laundering scheme, in violation of RICO's substantive prohibitions.[42] With respect to the extraterritoriality issue, there were two questions: first, whether "RICO's substantive prohibitions in section 1962 applied to conduct that occurred in foreign countries," and second, whether "RICO's private right of action in section 1964(c) applied to injuries that are suffered in a foreign countries."[43]

Relying in part on *Morrison*, the court utilized a two-step framework for analyzing extraterritoriality.[44] The first step asks whether the presumption against extraterritoriality has been rebutted — *i.e.*, "whether the statute gives a clear, affirmative indication that it applies extraterritorially."[45] If the statute is not extraterritorial, the second step is to determine whether the case involves a domestic application of the statute, looking at the statute's "focus."[46] If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application, even if some other conduct occurred abroad.[47] However, "if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory."[48] The step two focus analysis has been interpreted to examine whether the claims "touch and concern" the United States territory with "sufficient force" such that the presumption against extraterritoriality is displaced.[49]

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[37] *Id.* at 265 (emphasis added).

[38] Daniel R. Peacock, Note, *RICO's Extraterritorial Application: From* Morrison *to* RJR, Nabisco, Inc., 65 DRAKE L. REV. 555, 565 (2017).

[39] *Id.*

[40] *Id.* at 559.

[41] 136 S. Ct. 2090 (2016).

[42] *Id.* at 2098.

[43] *Id.* at 2099.

[44] *Id.*

[45] *Id.* at 2101.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 194 (5th Cir. 2017).

Applying this test to RICO, the Court found that the statute applies to some foreign racketeering activity.[50] In particular, a violation of section 1962 (b) and 1962 (c) may be based on a pattern of racketeering where the predicate offenses were committed abroad, as long as those offenses violate a predicate statute that is itself extraterritorial.[51] Thus, the allegations that *RJR Nabisco* violated these two subsections was a permissible extraterritorial application of RICO.[52]

However, the Court arrived at a different conclusion with respect to RICO's private right of action in section 1964(c). The section provides that "*[a]ny* person injured in his business or property by reason of a violation of section 1962"[53] may sue for treble damages, costs, and attorney's fees. The Court determined that the word "any" was not sufficient to displace the presumption against extraterritoriality.[54] Therefore, a civil RICO plaintiff has to allege and prove a domestic injury to business or property and is not allowed to recover full foreign injuries.[55] *RJR Nabisco* represents a departure from the way the Supreme Court had typically addressed extraterritoriality[56] — a change that may be due, at least in part, to the RICO statute's unique structure and language.[57]

Even more recently, in *WesternGeco v. ION Geophysical Corporation*,[58] the Supreme Court ruled on the case of a party seeking to recover lost foreign profits for patent infringement under the Patent Act. In this case, the Court applied the *RJR Nabisco* test but notably skipped step one of the analysis, going directly to step two (looking to the statute's "focus" to determine the statute's domestic applicability) stating that "Courts have discretion to begin at step two 'in appropriate cases'."[59] The Court ultimately found against the defendant, holding that because the focus of the statute was domestic infringement and the conduct relevant to the domestic infringement occurred within the United States, the foreign lost profits were a domestic application of the statute, rather than an impermissible extraterritorial application.[60]

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[50] *Id.*

[51] *RJR Nabisco*, 136 S. Ct. at 2105.

[52] *See id.* at 2106.

[53] 18 U.S.C. § 1964(c) (2012) (emphasis added).

[54] *RJR Nabisco*, 136 S. Ct. at 2111.

[55] *Id.*

[56] *See* Franklin A. Gevurtz, *Building A Wall Against Private Actions for Overseas Injuries: The Impact of* RJR Nabisco v. European Community, 23 U.C. DAVIS J. INT'L L. & POL'Y 1, 20 (2016); David Kurzweil, *Criminal and Civil RICO: Traditional Canons of Statutory Interpretation and the Liberal Construction Clause*, 30 COLUM. J.L. & SOC. PROBS. 41, 43 (1996).

[57] *See* Gevurtz, *supra* note 57, at 20; Kurzweil, *supra* note 57, at 43.

[58] 138 S. Ct. 2129 (2018).

[59] *Id.*

[60] *Id*. at 2138.

In another recent case, *Spanski Enterprises, Inc. v. Telewizja Polska, S.A.*, the DC Circuit applied *RJR Nabisco* to the Copyright Act.[61] The parties conceded that the Act had no extraterritorial application, thus requiring an *RJR Nabisco* analysis under step two.[62] Per *Morrison*, the analysis began by identifying what "the statute s[ought] to regulate" or "protect."[63] The court determined that the Copyright Act focuses on policing infringement.[64] While the defendant uploaded the infringing episodes in Poland, the court nonetheless found that the conduct relevant to the Copyright Act's focus occurred in the U.S., as those infringing episodes were subsequently shown on computer screens in the U.S. The case was therefore a permissible domestic application of the Copyright Act – even though other conduct had occurred abroad.[65] In so finding, the *Spanski* Court reasoned:

> Congress had good reason to allow domestic copyright holders to enforce their rights against foreign broadcasters who direct infringing performances into the United States. Given the ease of transnational transmissions, a statutory scheme that affords copyright holders no protection from such broadcasters wouldn't leave the door open rendering copyright in works capable online transmission largely nugatory.[66]

This same reasoning could apply to the DTSA, given the ease of transnational misappropriation created by technology.

B. Extraterritoriality: A Jurisdictional Question or a Merits Question?

One (of many) potentially confusing aspects of the DTSA's extraterritorial application is the question of whether, in conducting the extraterritoriality analysis, the court would be addressing a jurisdictional question or a question on the merits. Ultimately, the answer most likely depends on how the defendant states his or her objection or frames a motion to dismiss. Is the objection raised as a failure to state a claim, or lack of subject matter jurisdiction? Either way, as the discussion below suggests, a court would still end up conducting an extraterritoriality analysis.

Starting with *Morrison,* in deciding whether section 10(b) of the Securities and Exchange Act had extraterritorial reach, the Court noted: "[T]o ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question. Subject matter jurisdiction . . . presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief."[67] Moreover, in *RJR Nabisco*, the Court actually dealt with the substantive

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[61] 883 F.3d 904, 913 (D.C. Cir. 2018).

[62] *Id.*

[63] Morrison v. Nat'l Australia Bank, Ltd., 561 U.S. 247, 267 (2010).

[64] *Spanski Enterprises*, 883 F.3d at 913.

[65] *See id.* at 913-14.

[66] *Id.* at 915.

[67] *See Morrison*, 561 U.S. at 254.

provisions of RICO, but integrated the extraterritoriality analysis stating: "we separately apply the presumption against extraterritoriality to RICO's cause of action despite our conclusion that the presumption has been overcome with respect to RICO's substantive prohibitions."[68]

The Ninth Circuit used similar logic (in an even clearer manner than did the *Morrison* Court) in *Trader Joe's Co. v. Hallatt*, reasoning:

> [T]he extraterritorial reach of the Lanham Act raises a question relating to the merits of a trademark claim, not to the federal courts' subject-matter jurisdiction. On the merits, we conclude that Trader Joe's alleges a nexus between Hallatt's conduct and American commerce sufficient to warrant extraterritorial application of the Lanham Act.[69]

The Lanham Act creates a cause of action against "[a]ny person who shall . . . use in commerce any . . . colorable imitation of a registered mark." [70] In this context, commerce refers broadly to "all commerce which may lawfully be regulated by Congress."[71] Separately, federal courts have jurisdiction over all such claims.[72] Thus, by analogy, if a DTSA defendant objects that the "use in commerce" element is not met where the conduct occurs entirely abroad, then per the *Trader Joe's* court's reasoning this is not a jurisdictional question under Federal Rule of Civil Procedure (12)(b)(1), but instead a question on the merits under Rule (12)(b)(6). Relying on the Supreme Court's reasoning in *Arbaugh v. Y&H Corp*,[73] the court noted that the use in commerce requirement "is not connected to the Lanham Act's jurisdictional grant in 15 U.S.C § 1121 (a)" and that §1121 (a) gives the court subject matter jurisdiction.[74]

The *Trader Joe's* court explained, however, that the analysis is the same regardless of whether the extraterritorial question is jurisdictional or goes to the merits.[75] In deciding whether the statute reaches foreign conduct, the *Trader Joe's* court applied the *RJR Nabisco* framework as well as antitrust law's "effects test" to conclude that the Lanham Act had extraterritorial reach.[76] This "effects test" looked to see whether

> (1) the alleged violations . . . create some effect on American foreign commerce; (2) the effect [is] sufficiently great to present a cognizable injury to the plaintiffs under the Lanham Act; and (3) the interests of and

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[68] *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106 (2016).

[69] 835 F.3d 960, 963 (9th Cir. 2016).

[70] 15 U.S.C. § 1114(1) (2012).

[71] 15 U.S.C. § 1127 (2012).

[72] 15 U.S.C. § 1121(a) (2012).

[73] 546 U.S. 500 (2006).

[74] Trader Joe's Co. v. Hallatt, 835 F.3d 960, 967 (9th Cir. 2016).

[75] *Id.* at 969.

[76] *Id.*

> links to American foreign commerce [are] sufficiently strong in relation to those of other nations to justify an assertion of extraterritorial authority.[77]

The *Trader Joe's* court's proposed test is essentially the same as the domestic injury test we propose for the DTSA. The reference in the DTSA to *foreign commerce* (which is not referenced in the Lanham Act)[78] should mean that the DTSA similarly applies extraterritorially.[79] The *Trader Joe's* court found the "use in commerce" had broad application, which meant that it should apply extraterritorially.[80]

III. DTSA SECTIONS 1836 & 1837

On May 11, 2016, the DTSA became effective, amending the EEA to provide a private right of action.[81] According to section 1836: "[a]n owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce."[82] Section 1837 of the EEA immediately follows, reading:

> This chapter also applies to conduct occurring outside the United States if –
>
> (1) the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States or a State or political subdivision thereof; or (2) an act in furtherance of the offense was committed in the United States."[83]

This language provides a hook by which foreign theft of trade secrets or espionage may be prosecuted criminally in the United States. Though it appears settled that the provision — as a part of the criminal statute (the EEA) — applies extraterritorially, crimes committed against the U.S. government are treated differently with regard to the presumption against extraterritoriality.[84] Thus *RJR Nabisco* and its progeny do not apply to criminal prosecutions.[85] Ultimately,

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[77] *Id.* (citing Love v. Associated Newspapers, Ltd., 611 F.3d 601, 613 (9th Cir. 2010)).

[78] The civil liability section of the Lanham Act refers only to "commerce" not *foreign* commerce. 15 U.S.C. § 1114 (2012).

[79] Trader Joe's, 835 F.3d at 966 (citing Steele v. Bulova Watch Co., 344 U.S. 280, 286 (1952)).

[80] *See id.*

[81] 18 U.S.C. § 1836(b) (2012 & Supp. V 2018); Dennis Crouch, *The Economic Espionage Act as amended by the Defend Trade Secrets Act of 2016*, PATENTLY-O (May 12, 2016), https://patentlyo.com/media/2016/05/DTSA-Mark-UP-CROUCH-2.0.pdf [http://perma.cc/6CDS-UZNR].

[82] 18 U.S.C. § 1836 (2012 & Supp. V 2018).

[83] *Id.* § 1837.

[84] *See* United States v. Buck, 2017 U.S. Dist. LEXIS 158080, at *20-*21 (S.D.N.Y. Aug. 28, 2017).

[85] *Id*. at *19-*21.

however, the controversial question is whether the exact same language and provision as incorporated into the DTSA applies to civil actions.

Unlike RICO, which per the *RJR Nabisco* Court does not clearly indicate that it created a civil cause of action covering foreign injuries,[86] the DTSA does seem to provide such a clear indication. For instance, section 1837's explicit statement that it applies to the whole chapter[87] might be the "something more"[88] that the *RJR Nabisco* court wanted to see in the RICO statute. With respect to the criminal/civil dichotomy stemming from the *RJR Nabisco* majority's reasoning — *i.e.*, that the criminal section of RICO is extraterritorial while the civil section is not — Justice Ginsburg, writing in dissent, offered persuasive criticism. Section 1962, at least subsections (b) and (c), all agree, encompasses foreign injuries. How can § 1964(c) exclude them when, by its express terms, § 1964(c) is triggered by 'a violation of section 1962'?[89] She argues that RICO's private right of action incorporates the extraterritoriality provision from its predicate offenses.[90] The DTSA similarly so incorporates, arguably even more clearly than RICO does.

Given the above cases, what happens when one applies the focus test from *RJR Nabisco* to the DTSA? Context can be consulted and context can be dispositive.[91] The trademark cases, including *Trader Joe's*, suggest by analogy that the focus of the statute is protecting U.S. companies from trade secret misappropriation.[92] As previously discussed, the language of the DTSA specifically refers to the "harmful [effect on] United States companies" and the "[increasing] risk" to the trade secrets of these companies.[93] Moreover, *RJR Nabisco* demonstrates that not all statutes require an express statement of extraterritoriality.[94] Thus, where "RICO [is] the rare statute that clearly evidences extraterritorial effect, despite lacking an express statement of extraterritoriality"[95] a similarly strong argument can be made that the DTSA's contextual interpretation evidences an extraterritorial intention.

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[86] *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2108 (2016).

[87] 18 U.S.C. § 1837 (2012 & Supp. V 2018) ("This chapter also applies to conduct occurring outside the United States if").

[88] *RJR Nabisco*, 136 S. Ct. at 2108.

[89] *See id*. at 2113 (Ginsburg, J., dissenting).

[90] *Id.*

[91] *See* Peacock, *supra* note 38, at 579 (quoting RJR Nabisco, 136 S. Ct. at 2102-03).

[92] *See* Rochelle Dreyfuss & Linda Silberman, *Misappropriation on a Global Scale: Extraterritoriality and Applicable Law in Transborder Trade Secrecy Cases*, 8 CYBARIS INTELL. PROP. L. REV. 265, 315 (2017).

[93] *Id.*

[94] *See* Peacock, *supra* note 38, at 579 (quoting RJR Nabisco, 136 S. Ct. at 2102-03).

[95] *Id.*

A. Congressional Indication Present

In trying to determine whether Congress set out an affirmative indication that the DTSA should have extraterritorial application, we must look to the plain language of the statute and its context. Per *Morrison*, the overall context of the statute should be considered to determine whether Congress intended for the law to apply extraterritorially.[96] Section 1836 of the DTSA provides that "an owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce."[97] This section specifically references "foreign commerce," indicating a broader reach beyond domestic commerce.

Section 1836's "foreign commerce" language is the same as the language in § 1962 of the criminal RICO statute, which has been deemed to have extraterritorial application.[98] Compare this to RICO's civil action provision, which the *RJR Nabisco* majority found not to apply extraterritorially and in need of a domestic injury requirement, despite providing that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court."[99] The inclusion of express language puts the DTSA in a better position than RICO. Nevertheless, out of an abundance of caution we suggest adding a "domestic effect" requirement which would leave no doubt, and avoid the fate of the RICO interpretation.

Second, the very title of section 1837 "[a]pplicability to conduct outside the United States," as well as the language that it "applies" to "[t] his chapter" (*i.e.*, Chapter 90 of Title 18) suggests that it applies to the *entire* chapter, which includes the civil provision.[100] A court could therefore conclude from this literal reading of section 1837 that the extraterritorial provision applies to the entire chapter encapsulating both the EEA and the DTSA.[101]

Third, supporting congressional intent for broad extraterritorial application of the DTSA is the "Sense of Congress" section, expressing concern as to trade secret theft "around the world." [102] In addition, section 4 of the DTSA entitled "Report On Theft of Trade Secrets Occurring Abroad," requires the U.S. Patent

[96] *See id*. at 566.

[97] 18 U.S.C. § 1836(b) (2012 & Supp. V 2018).

[98] 18 U.S.C. § 1962 (2012) ("It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.").

[99] 18 U.S.C. § 1964(c) (2012).

[100] 18 U.S.C. §1837 (2012 & Supp. V 2018).

[101] *See* James Pooley, *The Defend Trade Secrets Act: A Year Later*, MANAGING INTELL. PROP. (June 23, 2017), http://www.managingip.com/Article/3727704/The-Defend-Trade-Secrets-Act-a-year-later.html.

[102] Jeffery A. Pade & Thomas A. Counts, *Trade Secrets Litigation Concerning Foreign Acts*, DEF. COUNSEL J. 1,8 (Jan. 2018).

and Trademark Office to issue regular reports on the scope of trade secret theft from U.S. companies "occurring outside of the United States" and the "threat posed" by this conduct.[103] More specifically, evidence of congressional concern about the harm caused by trade secret theft, regardless of the location of such conduct, is expressed in section 5 in the statement "wherever [trade secret theft] occurs, [it] harms the companies that own the trade secrets and the employees of the companies [.]"[104]

Thus, taken together the plain language, context and congressional intent of the DTSA support use of this Article's proposed 'domestic effect test' for establishing jurisdiction in United States courts over foreign defendants.

B. Congressional Indication Absent or Unclear

In arguing against congressional indication of extraterritoriality in the DTSA, one might note that when Congress amended the EEA to include the civil provisions of the DTSA, it did not include specific language authorizing extraterritorial reach of the DTSA. Moreover, the language of subpart two of section 1837 extends extraterritoriality where an act in furtherance of the offense occurs on U.S. soil.[105] Thus, one could therefore argue that conduct which occurs entirely outside of the United States, and not on U.S. soil, is not captured.

While there might be some question as to whether the phrase "act in furtherance" in part two of section 1837 limits the section to criminal offenses, it is possible that this same phrase supports extraterritorial application with a built-in condition.[106] Thus, an "act in furtherance," occurring in the United States would suggest that the DTSA would apply extraterritorially to capture conduct occurring outside of the U.S. — *as long as* some conduct also occurred in the United States. This might serve as a limiting principle on fairness and on constitutional boundaries in interpreting the extraterritoriality provision for civil actions. Of course, courts would still retain discretion to determine how much of the "act" must occur in the United States and the extent of its injurious effects.[107] Thus, it might be worth considering whether harm to the U.S. plaintiff can be an extension of an act in furtherance of the offense.

Because Congress did not specifically amend the language of the existing section 1837 when it created the DTSA, thereby leaving in the criminal terminology as it existed, some argue that section 1837 continues to refer solely to criminal conduct.[108] For example, the section refers to an "offender" and an

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[103] 18 U.S.C. §§ 1832-1839 (2012 & Sup. V 2018).

[104] *Id.*

[105] 18 U.S.C. §1837 (2012 & Supp. V 2018).

[106] *Id.*

[107] Pade & Counts, *supra* note 102, at 8.

[108] *See* Dreyfuss & Silberman, *supra* note 92, at 312-13 ("[T]he relationship between the civil provision and the original criminal statute is not straightforward. Moreover, the ramifications of engrafting the extraterritorial provision of the criminal statute on to the civil cause of action leads to an astonishingly broad reach.").

"offense" — terms typically used in a criminal rather than a civil context.[109] Moreover, some have even argued that these terms appear only in section 1837 and not in the remainder of the DTSA or EEA.[110] Even so, this could simply be because Congress did not change anything about section 1837. So, if the word "offense" did not appear anywhere else in the provisions that were changed, an argument could be made that it was simply an oversight without significance.

Unlike in the EEA, where the reach of the extraterritorial provision is limited by prosecutorial discretion, as noted in *RJR Nabisco,* a civil extension under the DTSA would not be so limited.[111] This could therefore present concerns as to, *inter alia*, comity.[112] However, comity is not an element of extraterritorial application. Borrowing from the antitrust and trademark law interpretations, comity should not be considered as a prerequisite for establishing whether the court should exercise subject matter jurisdiction. Rather, it should be considered as "prudential questions of whether that jurisdiction should be exercised."[113] While the courts have expressed concerns as to comity, especially in the civil context,[114] this concern provides even stronger support for deference to Congress to make clearer its consideration of possible international and diplomatic relations in statutes that confer extraterritorial jurisdiction.[115]

IV. ADDING A 'DOMESTIC EFFECT' TEST

Ideally, Congress should have amended section 1837 to make it unmistakably clear that it not only applies to sections 1831 and 1832 of the EEA (the criminal offenses) but also to section 1836 (the civil actions) of the DTSA.[116] This might have been the only way to put the controversy to rest. However, since Congress did not, the remaining options are to either amend the statute and/or leave it to the courts. Congress can amend the statute to make the language more explicit on its intent for the DTSA's extraterritorial reach, or courts could be left to

[109] 18 U.S.C. § 1837 (2012 & Supp. V 2018).

[110] *See, e.g.*, Dreyfuss & Silberman, *supra* note 92, at 312-13; Pade & Counts, *supra* note 102, at 7.

[111] RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106 (2016). *See also* Dreyfuss & Silberman, *supra* note 92, at 312-13.

[112] McBee v. Delica Co., 417 F.3d. 107,121 (1st Cir. 2005) (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 n.24. (1993)).

[113] *Id.*

[114] *See RJR Nabisco*, 136 S. Ct. at 2115.

[115] *See, e.g.*, Recent Cases, *Foreign Relations Law – Lanham Act Extraterritoriality – Ninth Circuit Applies the Lanham Act to Wholly Foreign Sales. - Trader Joe's Co. v. Hallatt, 835 F.3d 960 (9th Cir. 2016).,*130 HARV. L. REV. 1946, 1953 (2017) [hereinafter *Recent Cases*].

[116] *See* Pade & Counts, *supra* note 102, at 8-9.

interpret[117] the phrase "act in furtherance of the offense" currently included in the statute. Our suggestion is what we coin a 'domestic effect test' that could be built-in to the statute by Congress (as was Dodd-Frank, for example), or applied judicially (like the Lanham Act in trademark law). The test would allow application of U.S. law to conduct found to have sufficient harmful effects in the United States, even if the conduct is occurring outside of the U.S.

In looking for the affirmative intention of Congress, it seems that the Supreme Court applies very close scrutiny and a restrictive view of extraterritoriality, even in statutes where Congress seems to have expressed its desire for foreign application.[118] Thus, it is important to shore up the DTSA. Federal courts have been left to develop various balancing tests with respect to the application of the second step of *RJR Nabisco* and the inquiry into congressional limits. The tests that have emerged are very fact specific and allow the courts flexibility in making extraterritorial jurisdictional determinations.[119] With the Lanham Act, for instance, some courts look to see whether, among other things, the defendant's conduct affected American commerce and the effect created a cognizable injury.[120] Rather than permitting this variability, our 'domestic effect test' would provide uniformity and consistency among the circuits in interpreting the DTSA.

A. Proposed Language & Affirmative Indication

If the statute were to be amended, we propose that the new section 1837 of the EEA/DTSA read something akin to (proposed language in bold and italics):

> This chapter, ***including the civil right of action***, also applies to conduct occurring outside the United States if –
>
> (1) the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States or a State or political subdivision thereof, or
>
> (2) an act in furtherance of the offense was committed in the United States[121] ***or***
>
> ***(3) the offense causes substantial economic harm in the United States.***

First, this would add express language that the extraterritorial provision also applies to the DTSA and second, it would create a 'domestic effects' test. This proposed language, adding subsection 3, is similar to a recent bill to amend the

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[117] *See* Jada M. Colon, *The Court Must Play Its Interpretive Role: Defending the Defend Trade Secrets Act's Extraterritorial Reach*, 3 U. CIN. INTELL. PROP. & COMPUTER L.J. 15-16 (2018).

[118] *RJR Nabisco*, 136 S. Ct. at 2093-94 (citing Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013)).

[119] *Recent Cases*, *supra* note 115, at 1951.

[120] *Id.* at 1948.

[121] 18 U.S.C. § 1837 (2012 & Supp. V 2018).

DTSA proposed by Senator Kamala Harris.[122] Senator Harris' bill seeks to, among other things, expand the extraterritorial scope of the EEA to include offenses occurring abroad that have a "substantial economic effect" in the United States.[123] Our proposal is also comparable to what Congress has done in the securities context, as well as how some courts have approached the Lanham Act in trademark law.

For instance, after *Morrison*, Congress amended the Dodd-Frank Act to clarify the extraterritorial reach in securities fraud cases:

> The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of the antifraud provisions of this chapter involving—
>
> (1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
>
> (2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.[124]

This amendment essentially added an effects test, akin to what the Second Circuit had used prior to *Morrison*.[125] Our DTSA proposal is quite similar to that structure.

In addition, as with the Lanham Act, courts applying our 'domestic effects' test could require "evidence of impacts within the [U.S.], and these impacts must be of a sufficient character and magnitude to give the [U.S.] a reasonably strong interest in the litigation."[126] For the Lanham Act, the test is whether:

> (1) the alleged violations . . . create some effect on American foreign commerce; (2) the effect [is] sufficiently great to present a cognizable injury to the plaintiffs under the Lanham Act; and (3) the interests of and links to American foreign commerce [are] sufficiently strong in relation to those of other nations to justify an assertion of extraterritorial authority.[127]

Thus, adopting this domestic effect test would not create trade secret exceptionalism regarding extraterritoriality. Rather, it brings it in line with

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[122] Deterring Espionage by Foreign Entities through National Defense Act of 2018, S. 3743, 115th Cong. (introduced in the Senate, Dec. 12, 2018).

[123] *Id.*

[124] 15 U.S.C. § 78aa (2012).

[125] *See* Julie Rose O'Sullivan, *The Extraterritorial Application of Federal Criminal Statutes: Analytical Roadmap, Normative Conclusions, and a Plea to Congress for Direction*, 106 GEO. L.J. 1021, 1054 (2018).

[126] *See* McBee v. Delica Co., 417 F.3d 107, 120 (1st Cir. 2005).

[127] Trader Joe's Co. v. Hallatt, 835 F.3d 960, 969 (9th Cir. 2016) (quoting Love v. Associated Newspapers, Ltd., 611 F.3d 601, 614 (9th Cir. 2010)).

trademark law,[128] even if the law of both patent[129] and copyright may not enjoy as expansive an interpretation of extraterritoriality. Nevertheless, like the Lanham Act, Congress intended for the DTSA to reach some conduct. As one court noted: "In both the antitrust and the Lanham Act areas, there is a risk that absent a certain degree of extraterritorial enforcement, violators will either take advantage of international coordination problems or hide in countries without efficacious antitrust or trademark laws, thereby avoiding legal authority."[130]

B. Supporting Domestic Injury

Even if a court were to find the existing language of the DTSA insufficient for step one of the *RJR Nabisco* analysis, our proposed 'domestic effects test' could bolster a finding in step two for the focus of the statute. The court in *RJR Nabisco* with respect to section 1964(c), RICO's private right of action, indicated that the claim must allege and prove "a *domestic injury* to its business or property."[131] Thus, our proposed test would be consistent with the *RJR Nabisco* Court's requirement: essentially, domestic injury equals a domestic effect in the U.S. The test would allow the courts to focus not solely on the location of the misappropriation, but its impact in or on the United States. It would "[treat] the impact of the . . . conduct as much a part of the crime as the conduct itself."[132] This would be further consistent with how trade secret actions are handled before the ITC. The complaint must "state a specific theory and provide corroborating data" regarding the threat or effect of substantially injuring a domestic industry.[133]

Similar effects tests are used in other areas of law to permit a statute to apply extraterritorially if the illegal activity abroad caused a substantial effect in the U.S.[134] For instance, as discussed earlier, courts use effects tests to decide extraterritoriality of antitrust, securities, and RICO claims.[135] After *Morrison* introduced a transactional test, Congress enacted legislation to revive the effects test in the securities context.[136] While in *Morrison*, the Exchange Act was found to be silent on its extraterritorial application, the DTSA is and would not be silent, particularly if Congress adopts this new language.

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[128] *See supra* text accompanying notes 69-80 (discussing *Trader Joe's Co.*, 835 F.3d 960 (9th Cir. 2016)).

[129] *See* Dreyfuss & Silberman, *supra* note 92, at 293 (citing Microsoft v. AT&T Corp., 550 U.S. 437 (2007)).

[130] *See McBee*, 417 F.3d at 119.

[131] Peacock, *supra* note 38, at 580 (emphasis added).

[132] Najeeb Samie, *The Doctrine of Effects and the Extraterritorial Application of Antitrust Laws*, 14 U. MIAMI INTER-AM. L. REV. 23, 23 (1982).

[133] 19 C.F.R. § 210.12(a)(8) (2012).

[134] Peacock, *supra* note 38, at 556-57.

[135] *Id.*

[136] *See* Colon, *supra* note 117, at 17.

Other areas of law also provide guidance as to the use of this kind of test for applying extraterritorial provisions, as even when conduct occurs on foreign soil, it can still have harmful effects on U.S. companies and in the United States. Trademark law, for example, uses an effects test approach for the Lanham Act, but the level of the "effect" varies by circuit.[137] Similarly, securities law also utilizes a conduct and effects test.[138]

In the antitrust law context, for instance, the Supreme Court has held that the Sherman Act confers extraterritorial jurisdiction over foreign conduct where the conduct "was meant to produce and did in fact produce some substantial effect in the United States."[139] Congress also passed the Foreign Trade Antitrust Improvements Act to clarify that the Sherman Act reaches extraterritorial conduct if such conduct has a "direct, substantial, and reasonably foreseeable effect" on trade or commerce in the U.S.[140]

Supportive language from *Spanski Enterprises v. Telewizja Polska*[141] suggests that this type of explicit effects test may make a stronger case for the domestic injury suffered from the misappropriation. Thus, depending on the facts, a court could find that the context calls for a permissible domestic application of the statute without needing to consider the propriety of an extraterritorial reach in that case. In *Spanski,* the defendant uploaded infringing material to the Internet while in Poland, however that material was later shown on computer screens in the U.S.[142] The court found that the conduct relevant to the statute's focus occurred in the U.S., and the case was a permissible domestic application of the Copyright Act — even if other conduct occurred abroad.[143]

The court in *Spanski* recognized the ease with which technology facilitated foreign infringement and stated that "Congress had 'good reason' to allow domestic copyright holders to enforce their rights against foreign infringers,."[144] This reasoning applies equally to the DTSA. To the extent that trade secret misappropriation by foreign defendants causes domestic harm, a court could readily find that applying the statute "effectuates the Act's [DTSA's] guarantees and fully coheres with principles of extraterritoriality as articulated by the Supreme Court."[145]

Per the focus analysis (step two), as applied in both *Morrison* and *RJR Nabisco*, if the conduct relevant to the statute's focus "occurred in" the U.S., then there is a permissible domestic application of the statute — even if some

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[137] *See* McBee v. Delica Co., 417 F.3d 107, 115 (1st Cir. 2005) (describing a magistrate judge's use of for applying the Lanham as a combination of tests used by different circuits).

[138] *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 257-58 (2010).

[139] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993).

[140] 15 U.S.C. § 6a(1)(A) (2012).

[141] 883 F.3d 904 (D.C. Cir. 2018).

[142] *Id.* at 909.

[143] *See id.* at 914.

[144] *See id.* at 915.

[145] *See id.* at 916.

conduct occurred abroad. One possibility might be to merge or extend occurrence to denote injury. This concept is already present in the context of personal jurisdiction where courts look to where the harm was caused or where the plaintiff is located. For instance, when a trade secret has been misappropriated, the injury includes not only the loss of the trade secret, but also the resulting loss from the sales or value of the trade secret. Thus, in trade secret and other intellectual property cases, some long arm statutes and courts consider where the plaintiff suffered the injury.[146]

C. Possible Limits & Limitations

Even if the statute were clarified and expanded to ensure extraterritorial reach, it still would not be a cure-all. Both for doctrinal and practical reasons, there may still be obstacles (or viable arguments for foreign defendants, depending on one's perspective).[147] Some may be concerned that providing an extraterritoriality basis for both civil and criminal actions under the DTSA would be impermissibly broad. Having the DTSA apply to misappropriation in the United States for use abroad, misappropriations abroad for use in the United States, and/or to any taking by a U.S. national, casts too wide a net, and allows United States trade secrecy laws to influence business practices globally.[148] However, there are longstanding doctrines in place such as *forum non conveniens*[149] and personal jurisdiction[150] that could readily serve as a check against actions that appear to have little connection to the U.S.

There may also be comity concerns. As noted earlier, in both the antitrust and trademark law interpretations, comity is not considered as a prerequisite for establishing whether the court should exercise subject matter jurisdiction. Instead, it is viewed as a "prudential question . . . of whether that jurisdiction should be exercised."[151] While the courts have expressed concerns about comity, especially in the civil context,[152] it provides even stronger support for the idea that Congress should make clearer its consideration of possible international and

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[146] *See* GREGORY E. UPCHURCH, 1 INTELL. PROP. LITIG. GUIDE: PATENTS & TRADE SECRETS § 3:18 (2018); *see also* 16A CHISUM ON PATENTS 8231 (2018).

[147] *See, e.g.*, Robin J. Effron, *Trade Secrets, Extraterritoriality, and Jurisdiction*, 51 WAKE FOREST L. REV. 765 (2016) (discussing personal jurisdiction and forum non conveniens arguments).

[148] *See*, *e.g.,* Dreyfuss & Silberman, *supra* note 92, at 312.

[149] *See* Piper Aircraft Co. v. Reyno*,* 454 U.S. 233, 252, 256 (1981) (applying the forum *non conveniens* doctrine).

[150] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 cmts. f, h (1971) (discussing the connection between forum non conveniens and personal jurisdiction).

[151] McBee v. Delica Co., Ltd., 417 F.3d. 107,121 (1st Cir. 2005) (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798 n. 24. (1993)).

[152] RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106-07 (2016).

diplomatic relations in statutes that confer extraterritorial jurisdiction.[153] Even in *RJR Nabisco*, the majority noted the Court's desire to avoid international controversy where there has not been "clear direction from Congress."[154] Thus, further supporting the changes proposed in this Article. With respect to injunctions, courts limit relief to effect on U.S. market and losses in the U.S. This would certainly be consistent with the domestic effect test's focus on U.S. harms.

V. CONCLUSION

In this Article we endeavored to evaluate the extraterritorial provision of the DTSA. Some argue that it is unclear whether Congress intended the provision from the EEA to apply to the civil right of action embedded in the EEA as the DTSA. If the question were to reach a federal court, per the current Supreme Court jurisprudence, a court would likely first look to find a clear indication that Congress intended the provision to be extraterritorial. If the intention were not clear, the court would then look to the focus of the statute. We propose a new domestic effect test that would solidify the provision's extraterritorial reach. It could be incorporated into the statute by amendment, or used by courts to conduct their analyses. Finally, this proposed language and test is a vital step toward providing a meaningful remedy for domestic victims of extraterritorial misappropriation, as well as providing consistency among the circuits as they wrestle with extraterritoriality in trade secrecy.

[153] *See Recent Cases, supra* note 115, at 1953 (arguing that the Supreme Court has recently recognized it is ill suited to evaluate risks relating to "international discord").

[154] *See RJR Nabisco*, 136 S. Ct. at 2107.